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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1955

No.

LYNNE MARX GILMORE,
formerly LYNNE MARX KNAUER

Petitioner

vs

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, LYNNE MARX GILMORE, formerly LYNNE MARX KNAUER, respectfully prays that a Writ of Certiorari be issued out of and under the seal

of this Court to review the decision of the United States Court of Appeals for the Fifth Circuit rendered May 4, 1955, which decision by a divided court, reversed a judgment of the United States District Court for the Southern District of Florida (R-13). That decree dismissed complaint filed by the United States of America to recover from petitioner as a transferee unpaid income taxes of her deceased husband.

OPINIONS BELOW

The findings of fact, conclusions of law (R 11-12), and Final Judgment (R-13), of the United States District Court for the Southern District of Florida, were not reported.

The majority opinion of the Circuit Court of Appeals and the dissenting opinion of Chief Judge Hutcheson (R 36-51) is reported in 222 F 2d 167.

JURISDICTION

The judgment of the Court of Appeals sought to be reversed was entered May 4, 1955 (R 36-51). Petition for Rehearing seasonably filed by petitioner (R 53-59) was denied on June 29, 1955 (R-65). Motion to Stay Mandate was filed (R 66-68), and Order thereon entered July 9, 1955 (R-69).

The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

The questions presented by this Petition are:

1.

WHETHER A WIDOW WHO WAS BENEFICIARY OF HER HUSBAND'S LIFE INSURANCE AND ALSO ADMINISTRATRIX OF HIS ESTATE, IS LIABLE FOR HER DECEASED HUSBAND'S UNPAID FEDERAL INCOME TAX WHEN AS ADMINISTRATRIX SHE HAS EXHAUSTED THE ASSETS OF THE ESTATE IN PAYMENT OF FEDERAL ESTATE TAX WITHIN THE TIME REQUIRED BY STATUTE, AND PRIOR TO ASSESSMENT OR KNOWLEDGE OF ESTATE'S LIABILITY FOR INCOME TAX UNDER THEORY THAT SINCE VALUE OF INSURANCE POLICIES WHICH INURED TO HER PERSONALLY UNDER STATE STATUTES, HAD BEEN INCLUDED IN THE GROSS ESTATE OF THE DECEDENT AS REQUIRED BY 26 U.S.C.A. 811 (g) (2), WIDOW WAS PERSONALLY LIABLE TO THE UNITED STATES FOR PAYMENT OF DECEDENT'S UNPAID INCOME TAX UNDER PROVISIONS OF 26 U.S.C.A. 826 (c) AND 827 (b).

2.

WHERE THE UNITED STATES HAS NO CLAIM FOR ESTATE TAXES, CAN IT INVOKE THE REMEDY PROVIDED IN 26 U.S.C.A. 827 (b) TO ENFORCE PERSONAL LIABILITY ON A BENEFICIARY OF INSURANCE, PROCEEDS OF WHICH WERE INCLUDED IN GROSS ESTATE, TO COLLECT UNPAID FEDERAL INCOME TAXES OF SUCH DECEDENT?

3.
WHERE IN THE PLEADINGS AND TRIAL IN THE DISTRICT COURT THE UNITED STATES SOUGHT TO IMPOSE LIABILITY UPON PETITIONER AS TRANFEREE OF ASSETS OF HER DECEASED HUSBAND UNDER PROVISIONS OF 26 U.S.C.A. 311 (1) (f), 53 STAT. 90, FOR UNPAID FEDERAL INCOME TAXES OF THE DECEASED HUSBAND, DOES STATE LAW AS TO RIGHTS OF CREDITORS APPLY OR DO THE FEDERAL STATUTES RELATING TO INCOME TAXES AND ESTATE TAXES CREATE IN THE UNITED STATES AS A CREDITOR BOTH PRIORITY OF PAYMENT AND A PREFERRED REMEDY TO ENFORCE PAYMENT.

STATUTES INVOLVED

The pertinent provisions of the statutes involved are:

26 U.S.C.A. 811 (g) (2)

26 U.S.C.A. 826 (c)

26 U.S.C.A. 827 (b)

26 U.S.C.A. 311, 53 Stat 90

11 Florida Statutes Annotated; Title XIV Section 222.13; Section 222.14

are set forth in the Appendix.

STATEMENT

Petitioner is the widow and administratrix of the Estate of Francis A. Knauer, who died in an automobile accident on January 14, 1945 (R-11), who was at the time of his death forty two (42) years of age, a Vice-President and stockholder of a corporation, with his salary for three (3) years prior to his death being Eight Thousand ($8,000.00) Dollars per year.

The personal estate of the decedent amounted to $7,954.65 (R-11). His debts, including County, City and State taxes and Federal Income Taxes in question ($5,454.64), totaled $7,078.73. (Petitioner's Exhibits 1 and 2).

Decedent had in full force and effect at death insurance policies on his life payable to wife as named beneficiary in a double indemnity amount of $90,838.31, with a cash surrender value at death of the decedent in the total amount of $9,227. 98. The insurance proceeds inured to the benefit of petitioner (R-12), and federal estate tax liability of decedent as determined on the gross estate was $11,201.01 and was paid by petitioner using estate assets and personal funds (R-12).

On December 19, 1947 Commissioner of Internal Revenue assessed deficiencies in income tax against estate of decedent in the year 1954 in the amount of $3,858.17, and for the year 1944 of $1,596.47, or a total amount of $5,454.64 (R-12), of which there remains due and unpaid the sum of $5,354.64 plus interest from December 19, 1947.*

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*The difference is due to the fact that $100.00 was tendered by Petitioner in settlement of deficiency was applied against the assessment (R-2).

Notice of assessment and demand for payment were made upon adminstratrix of the estate of the decedent (R-12).

On August 20 1952 the United States instituted suit for recovery against petitioner as transferee of the assets of the estate of her deceased husband (R-1).

In petitioner's answer tax assessments, notice and demand for payment were admitted, and liability of the estate for taxes. Petitioner admitted the existence of life insurance policies and that her deceased husband had retained the right to change the beneficiary, that the policies had a cash surrender value on date of decedent's death, that she was beneficiary under the policies. Petitioner denied that the policies were assets of her husband's estate or that she was transferee (R 8-10), alleging that her husband had died without undertaking to exercise any control over the policies, and that any right that her husband may have had in and to the policies prior to his death had expired, and that, therefore, she could not be held liable as transferee of the proceeds or any part thereof (R-10).

After trial, the District Court concluded that

> "Neither the deceased nor his estate had any property or rights of property in the policies of insurance, nor the proceeds thereof of December 19, 1947, and defendant herein is not a transferee of property of the deceased tax payer within the meaning of 26 U.S.C.A. Sec. 311 (f) 53 STAT. 90" (R-12).

Judgment was thereupon entered in District Court in favor of petitioner (R-13).

The United States filed its Notice of Appeal to the United States Circuit Court of Appeals for the Fifth Circuit (R-31).

Upon appeal the Court of Appeals reversed (R 36-44), one Judge dissenting (R 44-51).

The Court of Appeals reversed the District Court and held that petitioner, who was beneficiary of her husband's life insurance and also administratrix of his estate, was liable for her deceased husband's unpaid federal income taxes when as administratrix she had exhausted the assets of the estate in payment of federal estate taxes prior to knowledge of liability for income taxes, since the proceeds of insurance were included for estate tax purposes in the gross estate of the decedent as required by 26 U.S.C.A. Sec 811 (g) (2); that Section 826 (c) gave the administratrix a right of action against herself to enforce contribution of such portion of the total tax paid as the proceeds of the policies had to the sum of the net estate; that the United States was entitled to be subrogated to the right of the administratrix to enforce payment of unpaid income taxes under Section 827 (b) against petitioner as a transferee of the life insurance policies to the extent that she should have used such proceeds to satisfy her personal liability for the estate taxes due upon the decedent's estate.

REASONS FOR ALLOWANCE OF WRIT

1. The decision is in irreconcilable conflict with other decisions of Circuit Courts of Appeals and from other courts.

The decision holds petitioner personally liable under 26 U.S.C.A. Section 811 (g) (2); 826 (c); and 827 (b); which are provisions of Chapter 3 of the Internal Revenue Code relating solely to estate taxes.

Section 811 (g) (2) requires that life insurance proceeds receivable by other beneficiaries be included in determining the gross estate of a decedent.

Section 826 (c) provides that if any part of the gross estate upon which estate taxes has been paid consist of proceeds of insurance policies upon the life of a decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total estate tax paid as proceeds of policies were to the sum of the net estate.

Section 827 (b) provides that if an estate tax not be paid when due, a beneficiary who received the proceeds of insurance included in the gross estate under Section 811 (g) to the extent of the value at decedent's death, shall be personally liable for the estate tax.

In this case, the United States has no claim for estate taxes and is in no position to invoke personal liability against petitioner under Section 827 (b).

The United States commenced its action to enforce personal liability against petitioner, not under Section 827 (b) for unpaid estate taxes, but for unpaid income taxes of her deceased husband under Chapter 1 of the Internal Revenue Code, Section 311 (a) (f), 53 Stat. 90, asserting that she was a transferee as therein defined.

Without precedent therefor, the decision extends Section 827 (b) to include unpaid income taxes, which construction is contrary to the clear language of the section, and gives to the United States as a creditor a remedy not provided for by statute.

Such interpretation and theory is in direct conflict with **Rowen v. Commissioner,** CCA 2d, 215 F 2d 641, wherein it was held:

> "The respondent refers to I.R.C. Section 811 (g) (2) whereby, solely for purposes of the Estate Tax imposed under Chapter 3 of Title 26, U.S. Code, it is provided that the amounts receivable by beneficiaries under life insurance policies 'with respect to which the decedent possessed at his death any of the incidents of ownership," are to be included in the gross estate. Under this provision, as we held in **Singer v. Shaughnessy,** 2 Cir., 198 F. 2d 178, the proceeds received by the petitioners here were to be included in the decedent's gross estate with the result that the estate tax was enforceable under I.R.C., Section 900 against the beneficiaries, to the extent of the proceeds received **by virtue of the liability expressly created** by I.R.C. Section 827 (b). But here the respondent seeks to enforce not an estate tax under Chapter 3 of the Code but an income tax debt under Chapter 1. He is invoking Section 311 which by its express terms is limited to the collection of income tax obligations imposed by Chapter 1. And Chapter 1 contains no provision in respect to income tax collection comparable to Section 827 (b)

> of the Code which expressly imposes liability for the entire tax on a 'beneficiary, who received * * * property included in the gross estate under Section 811 (f)'. The failure of Section 311 (f) to extend the definition of a transferee to include a 'beneficiary' as was done by I.R.C. Section 900 for purposes of estate tax collection, we think supports our holding that for purposes of income tax collection a beneficiary was not intended to be classed as a transferee as to the proceeds of a policy."

The reasoning and result in the Rowen case, supra, was adopted in **United States v. New**, CCA 7th, 217 F 2d 166, and while this decision primarily deals with construction of 26 U.S.C.A. Section 311, there is a definite conflict in this cited case with the decision herein.

The very theory on which the decision herein was decided was advanced in the Rowen case, supra, and refused consideration therein, which creates a conflict in interpretation of the statutes, which should be decided by this Court. The estate taxes were properly paid long prior to any knowledge that any liability for income taxes existed, and the theory of the Court below is based upon the hypothesis that if the liability of both income and estate taxes had been known at the time of the decedent's death, that the United States would then have been in a position to invoke and would have invoked, for the payment of its unpaid estate tax claims, the provisions of Section 827 (b), but such reasoning is not based upon the record of what was actually done, and to disregard what was actually done and decide the case on the theory of what might have been done, is to judicially legislate. It

has always been the rule that taxation deals not with what was attempted to be done but with what was done.[1]

The Court below expressly held:

> "The insurance also inured to the widow by virtue of the Florida Statues."

The Court then in its decision proceeded to nullify and abrogate the Florida Statute (Section 222.13) by imposing upon the petitioner, as beneficiary of insurance proceeds, a personal liability under an inapplicable federal statute (827) (b) that expressly limits its applicability to estate taxes, as this last section expressly refers to "taxes herein imposed."

The status of the United States as to such unpaid income taxes as against an estate of a decedent is that of a creditor[2], and its position is no different from that of any other creditor of an estate of a decedent except as to priority given it by federal statutes. No other creditor of a decedent could bring a similar action as here instituted by the United States against the petitioner as an individual. She was not sued as administratrix. In order to make her personally liable for payment of her deceased husband's unpaid income taxes, her liability must be fixed by a statute, for she is not liable for debts of another except as such liability is created by applicable statute. We have no Florida statutes creating such in-

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[1] *Jefferies v. Commissioner*, CCA 5, 158 F 2d 225
U. S. v. Commissioner, CCA 5, 559 F 2d 489
[2] *Tyson v. Commissioner*, CCA 6th, 212 F 2d 16

dividual liability so she can only be held liable by virtue of the federal statutes and the only statute that can be invoked is Section 827 (b) which relates solely to estate taxes, or under Section 311 (f), 53 Stat. 90, as a transferee.

If Congress had intended that a beneficiary of insurance proceeds be liable for unpaid income taxes where a decedent on whose life the policies were issued had retained the incidents of ownership in the policies, which caused the policies to be included for estate tax purposes under Section 811 (g) (2), it could easily have done so by expressly so providing. Not having done so, but expressly limiting this Section and Section 827 (b) to estate taxes, clearly indicates that as held in the Rowen case, supra, the construction in the decision below is erroneous.

Even assuming for the purpose of argument that the liabilities for both income taxes and estate tax had been known at the time of the decedent's death, and the petitioner had acted exactly the same as she did, the position of the United States would not have been changed. The same statutes would continue to apply and must be construed as written, and in the absence of fraud or proof of insolvency, the petitioner would not have been liable under the statutes invoked in the decision below to create liability for non-payment of her deceased husband's income taxes. The right of action of the United States under Section 827 (b)to enforce liability created for nonpayment of estate taxes, does not arise until there is a failure to pay such estate taxes.[1]

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[1] *Riggs v. Del Drago*, 317 U.S. 95, 63 S. Ct. 109, 87 L Ed 106
Fernandez v. Wiener, 326 U.S. 340, 66 S. Ct 178, 90 L Ed 116

Petitioner contends even in these supposed circumstances, that she would not have been liable as a transferee for her husband's unpaid income taxes, as the law of the State of Florida governs the determination of transferee liability.

2. This case raises important questions of federal law which have not been but should be settled by this Court.

It is unquestioned that this case originally started out in the District Court to enforce transferee liability on petitioner under provisions of 26 U.S.C.A. 311 (1) (f), 53 Stat. 90, for unpaid federal income taxes of her deceased husband on the basis that she was a transferee to the extent of the proceeds of insurance policies, or if not, at least to the cash surrender value of the policies at the time of the death of her husband upon whose life the policies of insurance were issued.

There has been considerable litigation on this question in the tax courts, district courts and circuit courts of appeals.[2]

The cases are in irreconcilable conflict, for as held in **Reinecke v. Commissioner,** CCA 8, 220 F 2d 406, it is stated:

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[2]*Christine D. Muller,* 10 T.C. 678
Pearlman v. Commissioner, CCA 3, 153 F 2d 560
K. Kieferdorf v. Commissioner, CCA 9, 142 F 2d 723 (Certiorari denied 323 U.S. 733, 65 S. Ct 69, 89 L Ed 588)
Tyson v. Commissioner, CCA 6, 212 F 2d 16
Rowen v. Commissioner, CCA 2, 215 F 2d 641
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U. S. v. Steele, 39-2 T.C. 9707, 26 Am Tax Reports 1186
U. S. v. Behrens, U.S.D.C.E.D.N.Y. 130 F. Supp. 93.

"Whether, for federal income-tax collection purposes, 'the existence and extent of a transferee's' liability is to be determined by local law' or is entitled to be rested 'on general law as declared by federal courts' is a question on which the Courts of Appeals have divided. **Rowen v. Commissioner,** 2 Cir. 215 F 2d 641, and **Pearlman v. Commissioner,** 3 Cir., 153 F. 2d 560, from which the expressions just quoted are respectively taken, are typical of the opposing views."

While it is true that because of the reasoning and theory of decision in this case, the Court refrained from deciding the question presented as to liability of the petitioner as transferee, this point was actually the sole question framed by the pleadings in the cause, tried and considered by the trial court, briefed and argued on the appeal, it would seem that this Court, in view of the many conflicting decisions, should set at rest the question of such liability, as it raises an important question of federal law, and in determining this question whether the liability of the transferee is determined by the general federal law as is found in **Pearlman v. Commissioner,** CCA 3rd, 153 F 2d 560, or whether the question should be determined by local state law as held in the **Rowen** case, supra, **Tyson v. Commissioner,** CCA 6, 212 F 2d 16, or left undecided as in **Reinecke v. Commissioner,** supra, as well as in the decision in this case.

Under the statutes of the State of Florida, the petitioner contended that neither the proceeds of the policies as a whole nor the cash surrender value thereof, were assets of the decedent, but that the proceeds under Florida statutes inured directly to her; that she was not

obligated as a transferee of property of the deceased within the meaning of Section 311 invoked against her, neither as to the entire proceeds of the policies nor as to the cash surrender value thereof. There was no proof that the decedent was insolvent at his death, but on the contrary he was solvent, and no liability as transferee could be imposed upon her by reason of the Florida statutes.

This is particularly true since this Court in **Phillips v. Commissioner**, 283 U.S. 589, 51 S. Ct 608-610, 75 L. Ed 1289, held that the statutory provision which is now Section 311 of the Internal Revenue Code.

> "provides the United States with a new remedy for enforcing the existing 'liability, at law or in equity'. The quoted words were employed in the statute to describe the kind of liability to which the new remedy is to be applied and to define the extent of such liability."

It is established that this section created no substantive rights or liabilities, and that the only liability to be enforced thereunder are those existing at law or in equity when the enforcement proceeding is begun.

In **Muller v. Commissioner**, 10 T.C. 678, also **Pearlman v. Commissioner**, CCA 3, 153 F 2d 560, and **Kieferdorf v. Commissioner**, CCA 9, 142 F 2d 723, (Certiorari denied 323 U.S. 733, 65 S Ct. 69, 89 L. Ed 588), the entire proceeds of the insurance policies were subject to transferee liability under Section 311 (f), while in the **Rowen case, supra, Tyson v. Commissioner**, CCA 6, 212 F 2d 16, **U. S. v. New**, CCA 7, 217 F 2d 116, and **U. S. v. Steele**,

39-2, T.C. 9797, 26 Am. Tax Reports 1186, such liability was restricted to cash surrender value of the policies at the time of the decedent's death, and liability of the beneficiary as transferee under the Section denied by reason of state law, there being no insolvency or fraud, and it is only the decision in the present case that holds liability under Section 827 (b). It is readily apparent that in dealing with this question many different conclusions have been reached by the different courts on different theories. There is a substantial general question involved herein not heretofore determined by this Court. This Court alone can settle the questions raised which are of general interest and concern and will continue to be involved in future proceedings until settled by this Court.

As required by 26 U.S.C.A. 811 (g) (2), petitioner, as administratrix, included the proceeds of the policies of insurance in the estate tax return, and paid the estate taxes within the time and as required, the amount thereof being in excess of the personal estate being administered. The additional amount of estate taxes was paid from personal funds by petitioner.

After she had paid the estate tax the Commissioner examined the income tax returns of her deceased husband for years prior to his death and subsequently assessed a deficiency, demanded payment of the petitioner, and when refused, filed a complaint to enforce personal liability against her, alleging that the decedent without consideration had transferred to petitioner, effective at his death, assets and things of value belonging to him, asserting that petitioner, without giving any thing of value therefor, took over and personally received from the estate of her deceased husband assets and things of

value, leaving the estate insolvent and without assets with which to pay its federal income taxes (R-3), thus proceeding as we contend and as the District Judge found (R-12), against the petitioner as a transferee within the meaning of 26 U.S.C.A. Section 311 (f) 53 Stat. 90.

Under Florida Statutes Annotated, Section 222.13, proceeds of life insurance inures exclusively and directly to the petitioner herein, and she was not obligated as a transferee of property of the deceased to pay the deficiencies.

The meaning and effect of the Florida Statutes have been construed by the Court rendering this decision[1] on several occasions, holding that the proceeds of life insurance policies in Florida do not pass to the executor or administrator of an insured's estate, but inure exclusively and directly to the beneficiary.

Petitioner was not obligated as a transferee of propery of the decedent. We assert that this rule is true as to an attempted application of Section 827 (b) where no estate tax is due.

In the decision, the Court below has departed so far from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

It is respectfully submitted that there is here pre-

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[1] *Webster v. Commissioner*, CCA 5, 120 F 2d 514
New York Life Ins. v. Balz, CCA 5, 151 F 2d 1014
Flick's Estate v. Comm. of Internal Revenue, CCA 5, 166 F 2d 733
Johnson v. Reny, CCA 5, 220 F 2d 73

sented a proper action for the exercise of the supervisory power of this Court.

It is respectfully submitted that a Writ of Certiorari should be granted, that the decision of the Court of Appeals should be reversed, and that the Decree of the District Court should be reinstated.

Respectfully submitted
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APPENDIX

Internal Revenue Code:

26 U.S.C.A. 1952 ed., Section 811: **Gross Estate:**

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * * * * * *

(g) (As amended by Sec. 404 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798) **Proceeds of Life Insurance.**—

(2) Receivable by other beneficiaries.—To the extent of the amount receivable by all other beneficiaries as insurance under policies upon the life of the decedent.

(a) purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance, or

(b) with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. For the purposes of clause (a) of this paragraph, if the decedent transferred, by assignment or otherwise, a policy of insurance, the amount paid directly or indirectly by the decedent shall be reduced by an amount which bears the same ratio to the amount paid directly or indirectly by the decedent as the consideration in money or money's worth received by the decedent for the transfer bears to the value of the policy at the time of the transfer. For the purposes of clause (b) of this paragraph, the term "incident of ownership" does not include a reversionary interest.

26 U.S.C.A. 1952 ed., Section 826: **Collection of Unpaid Tax:**

* * * * * * * * *

(c) (As amended by Sections 404 (b) and 414 (b) of the Revenue Act of 1942 supra) **Liability of Life Insurance Beneficiaries.**—Unless the decedent directs otherwise in his will, if any part of the gross estate upon which tax has been paid consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneciary such portion of the total tax paid as the proceeds of such policies bear to the sum of the net estate and the amount of the exemption allowed in computing the net estate, determined under section 935 (c). If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio.

16 U.S.C.A. 1952 ed., Section 827: **Lien for Tax:**

* * * * * * * * *

(b) (As amended by Section 411 (a) of the Revenue Act of 1942, supra).—**Liability of Transferee, Etc.**—If the tax herein imposed is not paid when due, then the spouse, transferee, trustee, surviving tenant, person in possession of the property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, who received, or has on the date of the decedent's death, property included in the gross estate under section 811 (b), (c), (d), (e),

(f), or (g), to the extent of the value, at the time of the decedent's death, of such property, shall be personally liable for such tax. * *

26 U.S.C.A. 1952 ed., Section 311: **Transferred Assets:**

(a) **Method of Collection.**—The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this chapter (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) **Transferees.**—The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this chapter.

(f) **Definition of "Transferee".**—As used in this section, the term "transferee" includes heir, legatee, devisee, and distributee.

11 Florida Statutes Annotated:

Title XIV—**Homestead and Exemptions:**

Section 222.13—**Life Insurance Policies; disposition of proceeds:**

"Whenever any person shall die in this state

leaving insurance on his life, the said insurance shall inure exclusively to the benefit of the child or children and husband or wife of such person in equal portions, or to any person for whose use and benefit such insurance is declared in the policy; and the proceeds thereof shall in no case be liable to attachment, garnishment or any legal process in favor of any creditor of the person whose life is so insured, unless the insurance policy declares that the policy was effected for the benefit of such creditor; provided, however, that whenever the insurance is for the benefit of the estate of the insured or is payable to the estate or to the insured, his executors, administrators or assigns, the proceeds of the insurance may be bequeathed by the insured to any person whatsoever or for any uses in like manner as he may bequeath or devise any other property or effects of which he may be possessed, and which shall be subject to disposition by last will and testament.

Section 222.14—**Exemption of cash surrender value of life insurance policies from legal process.**

"The cash surrender value of life insurance policies issued upon the lives of citizens or residents of the State of Florida, upon whatever form, shall not in any case be liable to attachment, garnishment or legal process in favor of any creditor of the person whose life is so insured, unless the insurance policy was effected for the benefit of such creditor."

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Sec. 826 (26 U. S. C. 1952 ed., Sec. 826)	4, 5, 9
Sec. 827 (26 U. S. C. 1952 ed., Sec. 827)	10
Miscellaneous:	
Treasury Regulations 105, Sec. 81.27	10

356143—55

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 288

LYNNE MARX GILMORE, FORMERLY LYNNE MARX KNAUER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 11–12) are not reported. The opinion of the Court of Appeals is reported at 222 F. 2d 167.

JURISDICTION

The judgment of the Court of Appeals was entered on May 4, 1955. A petition for rehearing was denied on June 29, 1955. The petition for a writ of certiorari was filed on August 2, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether petitioner, who was beneficiary of her husband's life insurance and also administratrix of his estate, is liable for her deceased husband's unpaid federal income taxes when, as administratrix, she had exhausted the assets of the estate, other than life insurance, in payment of federal estate taxes prior to knowledge of liability for deficiencies in income taxes.

STATUTE AND REGULATIONS INVOLVED

Sections 311 (a) (1) and (f), 811 (g) (1) and (2), 826 (c), and 827 (b) of the Internal Revenue Code of 1939, and Section 81.27 (a) and (b) of Treasury Regulations 105 are set forth in the Appendix, *infra*, pp. 8–11.

STATEMENT

Francis A. Knauer died on January 14, 1945, and petitioner, his widow, was appointed administratrix of his estate, which amounted to $7,954.65, exclusive of insurance and jointly owned property. At the time of his death, he held life insurance policies upon which he had paid the premiums and which had a cash surrender value of $9,227.98. His widow was the designated beneficiary subject to the retained right of the insured to change the beneficiary. Upon her husband's death, proceeds of the insurance in the amount of $90,838.31 were paid to or for the benefit of petitioner. (R. 11–12, 28.)

The federal estate tax liability of the decedent's estate, as determined by the Commissioner of Internal Revenue, was $11,201.01, based upon a gross estate for estate tax purposes of $131,544.90, consisting of $103,851.73 in life insurance, approximately $10,000 in stocks and bonds, and $17,000 in jointly owned property. Total allowable deductions exclusive of specific exemptions were $5,467.87. (R. 18, Govt. Ex. 2.) Thus, there would have been no estate tax liability but for the inclusion in the estate of the life insurance proceeds, the propriety of which inclusion is undisputed.

In December 1947, three years after decedent's death, the Commissioner asserted deficiencies against the estate for income taxes due for the years 1943 and 1944 in the total amount of $5,454.64. Prior to receiving notice of liability for these taxes, petitioner had paid the full amount of the federal estate taxes due, and in doing so had exhausted the assets of the estate, other than the life insurance, and, in addition, had used some personal assets. (R. 12.)

Suit was instituted by the United States against petitioner for recovery of the income tax deficiencies assessed against the husband's estate. (R. 12, 16, 18, 24–28.) The District Court, holding that there was no transferee liability under Section 311 (f) of the 1939 Code, dismissed the action. (R. 12.) The Court of Appeals, with

Chief Judge Hutcheson dissenting, reversed, holding it decisive "that, under 26 U. S. C. A. 811 (g) (2), 826 (c), and 827 (b), the proceeds of the life insurance were subject to being applied to the payment of the estate taxes thereby leaving enough other estate for the payment of the income tax * * *." Concluding that the petitioner was liable on this basis, the Court of Appeals found it unnecessary to consider the problem of transferee liability under Section 311 (f).

ARGUMENT

1. The decision of the Court of Appeals is correct. Section 826 (c) of the Internal Revenue Code of 1939 (Appendix, *infra*, pp. 9–10) provides that unless the decedent directs otherwise in his will, if any part of the estate upon which tax has been paid consists of proceeds of insurance policies upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from the beneficiary such portion of the total tax paid as the proceeds of such policies bear to the net estate and the amount of the exemption allowed in computing the net estate. It is undisputed that the inclusion of the proceeds of the insurance policies received by the widow here resulted in an estate tax of over $11,000. And the assets of the decedent's estate were sufficient, exclusive of insurance and jointly-owned property, to pay the federal income taxes together with other obligations of the estate, ex-

cepting estate taxes.* Nevertheless, none of the federal income taxes were paid, but the assets other than the insurance proceeds were applied to the payment of estate taxes.

In these circumstances, the widow, as beneficiary of the insurance proceeds, was obligated under Section 826 (c) to contribute to the payment of estate taxes; and to the extent that the other assets of the estate were applied to the payment of estate taxes she was liable to herself as executrix, and hence liable to the United States, for the estate's debt for income taxes. So holding, the Court of Appeals found it unnecessary, as petitioner recognizes (Pet. 14), to consider whether the widow, as beneficiary, was a transferee of the decedent to the extent of the cash surrender value or the total proceeds of the insurance policies upon his life.

2. Petitioner errs in her assertion that the decision below conflicts with *Rowen* v. *Commissioner*, 215 F. 2d 641 (C. A. 2d), and *United States* v. *New*, 217 F. 2d 166 (C. A. 7th). Neither of these cases involved the question decided in the instant case. In neither was Section 826 (c) asserted or considered. The sole question in each was whether the beneficiary of insurance policies was liable in law or in equity under Section 311 of the

*The assets of the estate exclusive of insurance and jointly-owned property amounted to $7,954.65. The federal income taxes involved here amount to $5,454.64. The other debts of the estate totalled $1,407.88.

Internal Revenue Code of 1939 (Appendix, *infra*, pp. 8–9). In both cases the courts held merely that local law was applicable, and that under local law there was no showing that the beneficiary was liable. That there is no conflict with either of the above decisions is clearly demonstrated by the opinion in *United States* v. *Truax*, decided by the Fifth Circuit on June 2, 1955, after its decision in the instant case. There, in an opinion by Judge Tuttle, one of the majority in the instant case, it quoted from the *Rowen* case, *supra*, as follows:

> Granted that the appellants are transferees as to the cash surrender values of the policies, are they under "liability, at law or in equity" for their decedent's unpaid income taxes? In determining this question we hold that the local state law governs. For neither by Section 311 nor by any other federal statute is the *liability* of such a transferee defined. Granted that Congress by specific legislation might have preempted the field, it has not chosen to do so. As a result, when Congress extended its general tax-collection procedure to the "liability" of a transferee it necessarily must have intended that the existence of liability should be determined by State law. Other than the State law, there is no source to which we may look for pertinent authority.

The Fifth Circuit then stated:

> We are in complete agreement with this holding and the reasoning quoted: and in

the only other case in which we passed on the question, we so held. *Liquidators of Exchange Nat. Bank* v. *United States*, 65 F. 2d 316. In *United States* v. *Gilmore* * * * [the instant case], we found that the payment by the administratrix of estate taxes from regular estate assets gave rise to liability of the beneficiary of the decedent's life insurance by virtue of an express federal statutory duty of contribution, which the Government can compel the administratrix to enforce for its benefit. 26 U. S. C. (1952 Ed.) § 826 (c). Our majority opinion there was of course consistent with our present opinion that in the absence of a federal statutory liability, the only source of liability is state law; and Judge Hutcheson's dissenting opinion very forcefully took that position.

CONCLUSION

The decision below is correct and there is no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1955.

APPENDIX

Internal Revenue Code of 1939:

SEC. 311. TRANSFERRED ASSETS.

(a) *Method of collection.*—The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this chapter (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suit for refunds):

(1) *Transferees.*—The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this chapter.

* * * * *

(f) *Definition of "transferee".*—As used in this section, the term "transferee" includes heir, legatee, devisee, and distributee.

(26 U. S. C. 1952 ed., Sec. 311.)

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

(g) (As amended by Sec. 404 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798) *Proceeds of life insurance.*—

(1) *Receivable by the executor.*—To the extent of the amount receivable by the executor as insurance under policies upon the life of the decedent.

(2) *Receivable by other beneficiaries.*—To the extent of the amount receivable by all other beneficiaries as insurance under policies upon the life of the decedent.

(A) purchased with premiums, or other consideration, paid directly or indirectly by the decedent, in proportion that the amount so paid by the decedent bears to the total premiums paid for the insurance, or (B) with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. For the purposes of clause (A) of this paragraph, if the decedent transferred, by assignment or otherwise, a policy of insurance, the amount paid directly or indirectly by the decedent shall be reduced by an amount which bears the same ratio to the amount paid directly or indirectly by the decedent as the consideration in money or money's worth received by the decedent for the transfer bears to the value of the policy at the time of the transfer. For the purposes of clause (B) of this paragraph, the term "incident of ownership" does not include a reversionary interest.

* * * * *

(26 U. S. C. 1952 ed., Sec. 811.)

SEC. 826. COLLECTION OF UNPAID TAX.

* * * * *

(c) (As amended by Section 404 (b) of the Revenue Act of 1942, *supra*) *Liability of life insurance beneficaries.*—Unless the decedent directs otherwise in his will, if any part of the gross estate upon which

tax has been paid consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds of such policies bear to the sum of the net estate and the amount of the exemption allowed in computing the net estate, determined under section 935 (c). If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio.

(26 U. S. C. 1952 ed., Sec. 826.)

SEC. 827. LIEN FOR TAX.

* * * * *

(b) (As amended by Section 411 (a) of the Revenue Act of 1942, *supra*).—*Liability of transferee, etc.*—If the tax herein imposed is not paid when due, then the spouse, transferee, trustee, surviving tenant, person in possession of the property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, who receives, or has on the date of the decedent's death, property included in the gross estate under section 811 (b), (c), (d), (e), (f), or (g), to the extent of the value, at the time of the decedent's death, of such property, shall be personally liable for such tax. * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 827.)

Treasury Regulations 105, promulgated under the Internal Revenue Code of 1939:

SEC. 81.27 (as amended by T. D. 5239, 1943 Cum. Bull. 1081) *Insurance receiv-*

able by other beneficiaries.—(a) *In case of decedent dying after October 21, 1942.*

* * * * *

For the purposes of this section, the term "incidents of ownership" is not confined to ownership in the technical legal sense. For example, a power to change the beneficiary reserve to a corporation of which the decedent is sole stockholder is an incident of ownership in the decedent. For the purposes of this subsection, the term "incidents of ownership" includes the incidents of ownership described in subsection (b) * * *.

(b) *In case of decedent dying on or before October 21, 1942.*—The regulations prescribed under this subsection (except as otherwise indicated herein or in subsection (a) of this section) are applicable only in the case of decedents who died on or before October 21, 1942, the date of the enactment of the Revenue Act of 1942. * * *

* * * * *

Incidents of ownership in the policy include, for example, the right of the insured or his estate to its economic benefits, the power to change the beneficiary, to surrender or cancel the policy, to assign it, to revoke an assignment, to pledge it for a loan, or to obtain from the insurer a loan against the surrender value of the policy, etc. The insured possesses an incident of ownership if his death is necessary to terminate his interest in the insurance, as, for example, if the proceeds would become payable to his estate, or payable as he might direct, should the beneficiary predecease him.

* * * * *

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